EPA's Acting Assistant Administrator for Water Claims	AFBF Response	NRDC Analysis of AFBF Arguments
There's been some confusion about EPA's proposed "Waters of the U.S." rule.	That's because the rule doesn't CLARIFY anything except that almost any low spot where rainwater collects could be regulated. The proposed rule defines "tributaries" and "adjacent" in ways that make it impossible for a typical farmer to know whether the specific ditches or low areas at his or her farm will be "waters of the U.S."—but the language is certainly broad enough to give agency field staff plenty of room to find that they are! (79 Fed. Reg. 22206, 22209)	There's not much to respond to here – it's mainly just rhetoric. But, it sounds a common theme in this document – the Farm Bureau repeatedly reads the proposed language in the broadest way possible, often to the point of absurdity, so as to come to the conclusion that the rule would regulate things that the agencies clearly don't have any intent to cover and have not – by any fair reading of the proposal – tried to cover. If the Farm Bureau, however, feels that the proposed definitions could be made clearer, it has the same right as the hundreds of thousands of people who have asked the agencies to finalize a strong rule – it can suggest improvements during the public comment period any time before October 20.
The rule keeps intact all CWA exemptions and exclusions for agriculture that farmers count on. But it does more for farmers by actually expanding those exemptions.	It has to! Congress provided those exemptions in the statute, and the agencies can't take them away by regulation. However… The categories of exemptions are still there, but because of the expansion of jurisdiction over more small, isolated wetlands and land features like ditches and ephemeral drains, fewer farmers will benefit from the exemptions. The exemptions for activities occurring in "waters of the U.S." have been interpreted by the agencies to be ridiculously narrow (e.g., you can plow and plant in a wetland, but only if you have been farming there since 1977, and only if you do not alter the hydrology of the wetland, and you cannot apply fertilizer or herbicide there without an NPDES permit). *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).	The rule would not be an "expansion" of traditional coverage dating back to the Reagan administration. It would restore coverage to a small percentage more waters than are being protected under policies in place today. But it's important to understand that those policies are more restrictive than required by the Supreme Court, especially given the new compilation of the science supporting broad protections. Most importantly, it will provide clear protections for waters that there should be no question about but are in limbo today. There is no 1977 limitation on this exemption, period. The case that the Farm Bureau cites ruled that the discharge in question would so fundamentally alter the watershed hydrology that it would require permitting under a section of the Act that limits the applicability of the exemptions. [*U.S. v. Cumberland Farms of Conn., Inc*., 647 F.Supp 1166 (D. Mass. 1986) ("Cumberland's activities involve precisely what is prohibited: the wholesale modification of a major aquatic system having an adverse effect, both individually and cumulatively.")] The idea that exempted activities lose their exemption if they "alter the hydrology" of covered waters is overstated. Any alteration doesn't trigger permitting, but Congress – not the agencies – required discharges causing significant harm to be

		permitted. [See Clean Water Act § 404(f)(2); 40 C.F.R. § 232.3(b) ("Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.")] Although it is true that certain exemptions only apply to discharges of dredged or fill material, as opposed to pesticides, other exemptions are also available. For example, wetlands qualifying as prior converted cropland are not protected waters. [Proposed 40 C.F.R. § 230.3(t)(2)] Discharges of agricultural stormwater or of water flowing back from irrigated areas do not require permits, even if they contain chemical pollutants like pesticides. [Clean Water Act § 502(14)] And, where the activity isn't covered by an exemption, like an industrial livestock operation pumping waste into an on-site stream, it's absolutely appropriate for the Clean Water Act to control that pollution.
But it does more for farmers by actually expanding those exemptions. We worked with USDA's Natural Resources Conservation Service and the Army Corps of Engineers to exempt 56 additional conservation practices.	These practices were already exempt (for farmers who have been farming continuously at the location since 1977), but now they are exempt with strings (NRCS standards compliance).	Before the agencies' agriculture exemption rule (with which, to be clear, NRDC has a number of concerns), these 56 activities were not identified as definitively exempt from dredge/fill permitting – there was only a very brief list ("plowing, seeding, cultivating, minor drainage, and harvesting … or upland soil and water conservation practices") of exempted activities. Now, that list has expanded by 56, and the obvious intent of the agriculture exemption rule is to allow certain kinds of activities to go forward without review. In light of push-back from organizations on all sides, the agencies are now re-evaluating how to move forward. The lesson to take from that? Comments matter, and that's why Big Ag should provide substantive and constructive input on the Clean Water Protection Rule, as NRDC and our partners will be doing.
The American agriculture economy is the envy of the world, and today's farmers and ranchers are global business professionals – relying on up-to-the-minute science to make decisions about when to plant, fertilize and irrigate crops.	Yes—and they are also families and small business owners who cannot afford tens of thousands of dollars of additional costs for federal permitting of ordinary farming activities. Which is why they shouldn't have to wait months or years for a federal permit to plow, plant, fertilize or apply pest or	The Clean Water Act permit programs require a discharge into a water body, so ordinary business that doesn't involve a discharge won't require such a permit. "Normal farming" is expressly exempt from the dredge and fill program (except for significantly harmful discharges, as noted above). The Clean Water Act explicitly

	disease control.	includes "plowing" and "seeding" in that exemption, contrary to AFBF's suggestion. [Clean Water Act §404(f)(1)(A)] Other discharges have additional exemptions. In the event that a discrete discharge will in fact pollute a water body covered by the law, the discharge can still happen promptly. The Corps has developed several nationwide permits, including a permit for agricultural activities, allowing speedy action, and – by our count – pesticide discharges in 42 states are covered by a general permit for pesticide discharges from the state or EPA.
When Congress passed the CWA in 1972, it didn't just defend the mighty Mississippi or our Great Lakes; it also protected the smaller streams and wetlands…But two Supreme Court cases over the last 15 years confused things, making it unclear which waters are "in," and which are "out."	And yet, Congress chose to authorize federal regulatory power over "navigable waters," which the Supreme Court has said means EPA cannot regulate the entire "vast, interconnected system" of waters. The Supreme Court didn't "confuse things." It ruled that the agencies' pre-2001 regulation of all waters to the full extent of the U.S. commerce power – even based only on the use of waters by migratory birds – was illegal. EPA's proposed rule doesn't make it clear which features are "in" and which are "out," but it does provide a rationale for agency or citizen enforcers to claim that almost any ditch or low spot is "waters of the U.S." This creates confusion and risk—not clarity.	The Supreme Court has said three essential things about this issue: • "[T]he term 'navigable' as used in the Act is of limited import." [*U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)] • The Act does not protect a water body solely based on its function as habitat for migratory birds [*Solid Waste Agcy. of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001)] • At least those kinds of water bodies that collectively have a significant impact on the condition of downstream waters can be protected. [*Rapanos v. U.S.*, 547 U.S. 715 (2006)] By basing the scope of the clean water proposal on the science that shows the connectivity between different kinds of waters and ones downstream, the agencies are well within the Court's directions. Indeed, because the Court didn't strike down any piece of the agencies' regulations, NRDC has concerns that the proposal does not protect all of the water bodies that it could, particularly with respect to waters outside of the floodplain of covered waterways.
That confusion added red tape, time and expense to the permitting process under the Clean Water Act. The Army Corps of Engineers had to make case-by-case decisions about which waters were protected, and decisions in different parts of the country became inconsistent.	The Supreme Court rulings didn't complicate the permitting process. That was already a morass of red tape. They only made it more difficult for the Corps and EPA to assert jurisdiction over small, isolated waters and "waters" that are dry most of the time. The proposed rule will make it easier for the Corps and EPA to make "desktop determinations" that any wetlands across huge swaths of the countryside are categorically jurisdictional. (79 Fed. Reg. 22195,	Wrong. Even organizations that have urged a narrow scope of clean water protections agree that the case-by-case process that exists today is unworkable. For example, in 2009, a witness testifying in Congress on behalf of the Associated General Contractors of America said: "Proceeding on a case-by-case basis is unacceptable to AGC." We also see delays in effective implementation of the law regularly.

	22214)	Consider a case in which the defendant had filled streams and wetlands that flow into the actually-navigable Weweantic River in MA between 1979-1999. Resolution of the case was hung up for years in court fights about whether the waters were protected by the law. The Supreme Court finally denied review in 2007. [*U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006)] In asking the Supreme Court to review a federal appeals court decision effectively requiring case-by-case review of individual water bodies, the Bush administration noted that in just the three states covered by the court, "approximately 28,215 additional hours of agency time would have been expended" in a single year using the case-by-case approach. [Petition for a Writ of Certiorari, *U.S. v. McWane, Inc.*, at 30 (Aug. 2008).]
EPA's proposal will bring clarity and consistency to the process, cutting red tape and saving money.	A rule that regulates all "waters" lying within a "floodplain" but leaves to case-by-case judgment whether it's a two-year floodplain or a 100-year floodplain does not promote clarity or consistency. (79 Fed. Reg. 22208-9) The only reduction in red tape and cost will be for regulators who can categorically regulate small, isolated and mostly dry features. Red tape and cost for farmers and any other entity building on or using the land will INCREASE.	Actually, the definition of "floodplain" in the proposal is virtually identical to the technical definition from the scientific analysis of the connectivity of water bodies. [U.S. EPA Office of Research and Development, *Connectivity of Streams and Wetlands to Downstream Waters*, at p. A-5 (Sept. 2013)] And that analysis concludes that waters located in the floodplain "serve an important role in the integrity of downstream waters…." [p. 1-3] Of course, if the Farm Bureau has a better way of defining the floodplain that is scientifically-based and that still ensures that it includes the waters that have these important functions, that's exactly why the proposed rule is out for public comment.
The proposed Waters of the U.S. rule does not regulate new types of ditches, does not regulate activities on land, and does not apply to groundwater.	Ditches - Current rules do NOT INCLUDE ditches. Agencies have informally interpreted rules to include ditches as "tributaries." We disagree! Now, the new rule would categorically define almost all ditches as "tributaries." (79 Fed. Reg. 22203-4) Activity on land - Yes, the proposed rule would regulate activities on land that is usually dry but where water channels and flows or ponds when it rains. The rule calls these areas "ephemeral streams," "wetlands" and "seasonal ponds" – but to most people, they look like LAND.	Ditches – The Farm Bureau is wrong. The existing rules absolutely cover manmade and man-altered features as tributaries, as discussed below. In addition, the U.S. Court of Appeals for the D.C. Circuit specifically rejected the idea that covering ditches is novel, noting instead "the Corps's persistent view that some upland ditches may be jurisdictional…." [*Nat'l Assn. of Home Builders*, 663 F.3d 470 (D.C. Cir. 2011)] Also, if ditches couldn't be tributaries, then the Supreme Court should've ruled in its 2006 case that the wetlands at issue, "which lie near ditches or man-made drains that eventually empty into traditional navigable waters," were not subject to the regulations applicable to wetlands adjacent to tributaries, but it

		didn't. [*Rapanos v. U.S.*] Activity on land – Note the trick here, which is echoed throughout the Farm Bureau's piece. They take recognized and scientifically-understood terms like "ephemeral stream" and "wetland" and call them "land." Don't be fooled – these features have long been understood to be protected by the law. The question of whether wetlands could be protected by the Act was answered "yes" by a unanimous Supreme Court in 1985 [*Riverside Bayview*] and streams have been understood to be covered even when they dry up since the early days of the Act. [*See, e.g., U.S. v. Phelps Dodge Corp.*, 391 F. Supp 1181 (D. Ariz. 1975); *U.S. v. Zanger*, 767 F.Supp 1030 (N.D. Cal. 1991); *U.S. v. Sheyemme Tooling & Mfg. Co., Inc.*, 952 F.Supp. 1414 (D.N.D. 1996)]
The proposal does not change the permitting exemption for stock ponds, does not require permits for normal farming activities like moving cattle, and does not regulate puddles	Stock ponds - The proposed rule makes the exemption for stock ponds meaningless because it would regulate the low spots where farmers typically build ponds. The rule would *only* allow farm ponds built by diking "upland." This is a farm pond that only a Washington bureaucrat would build. Normal farming activities - This is false. Under the rule, Section 402 permits would be necessary for common farming activities like applying fertilizer or pesticide—or moving cattle—if materials (fertilizer, pesticide or manure) would fall into low spots or ditches. Section 404 permits would be required for earth-moving activity, such as plowing, planting or fencing, except as part of "established" farming ongoing at the same site since 1977. Puddles - The rule would not categorically regulate all puddles—but it would regulate low spots that puddle often enough to meet the broad definition of "wetlands" if those low spots are in a "floodplain" or a "riparian area" or if they, combined with other low spots in the region, have a "significant nexus" to any other "water of the U.S." Clear as mud, right? Here is what the proposal says about "puddles:" (79 Fed. Reg. 22218)	Stock ponds – the Farm Bureau's claims are wrong. First, discharges of dredged or fill material into protected waters associated with "construction or maintenance of farm or stock ponds" will typically be exempt under the law. [Clean Water Act §404(f)(1)(C)] Second, discharges into the stock ponds themselves will not be covered, as the rule *for the first time* adds to the regulation a provision saying that "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing" are not protected waters. [Proposed 40 CFR 230.3(t)(5)(ii)] This section of the proposal does not use the term "upland," but even if it did, it doesn't mean a hillside, as the Farm Bureau implies. Again, consider the scientific terminology from the connectivity report: "Uplands—(1) Higher elevation lands surrounding streams and their floodplains. (2) Within the wetland literature, specifically refers to any area that is not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition." Normal farming activities – the Farm Bureau is wrong again. The proposal does not change in any way the way that application of pesticides or other agricultural chemicals are regulated (or not) under the Clean Water Act. These activities, when they involve spraying

		"directly to waters of the United States, or where a portion of the pesticide will unavoidably be deposited to waters of the United States," require a permit. Rainfall or irrigation water that washes pesticides or other agricultural products into protected waterways does not require permitting. [Clean Water Act §502(14)] Puddles – Notice what the Farm Bureau does here. It calls "wetlands," which are widely-understood hydrological features, "puddles," despite their enormous importance for flood control, pollutant filtration, groundwater recharge, and wildlife habitat. In doing so, they mislead farmers and others who care about protecting water quality that this rule would cover far more than it would. As for real "puddles" as all of us understand that term, the agencies' proposal says "a relatively small, temporary pool of water that forms on pavement or uplands immediately after a rainstorm, snow melt, or similar event … cannot reasonably be considered a water body or aquatic feature at all." [79 Fed. Reg. at 22,218]
The proposed rule does NOT protect any waters that have not historically been covered under the Clean Water Act, and the proposed rule is consistent with Supreme Court decisions.	The Supreme Court said twice that EPA's "historical" scope of regulation was unlawful. Prior to the Supreme Court decisions, EPA used the "migratory bird rule" to regulate nearly all waters. EPA's proposed new rule based on the "connectivity" of all waters is just as broad and just as unlawful. The proposed rule is a cynical attempt to overcome the Supreme Court decisions by finding that virtually all waters have a "substantial nexus" to navigable waters.	The Farm Bureau is wrong. The proposed rule is neither over-broad nor unlawful; if anything, the science and law demand that the agencies ensure that more aquatic resources are protected. According to the agencies' analysis of the proposed rule's impact, approximately 17-26% of "other waters" (generally non-wetland adjacent waters and water bodies outside the floodplain of other covered waters) would be protected, as compared to the near-100% coverage under the traditional approach. [Economic Analysis, p. 44, Exhibit 28] The Farm Bureau is entitled to its opinions, but it can't make 26 equal 100. As for its legality, the Supreme Court has established that the law protects *at least* those kinds of waters that the science demonstrates have significant downstream effects, when considered collectively, and the copious science that the proposal relies upon shows that tributaries and nearby waters easily meet this test. We believe additional categories of waters do as well, a point we will be making in our public comments on the rule; if the Farm Bureau thinks these

		waters don't matter, it should take advantage of the fact that the agencies have sought relevant scientific evidence in a number of ways.
The EPA and the Army Corps are NOT going to have greater power over water on farms and ranches.	The only way the agencies can believe this is if they believe they already have power over almost every low spot where water flows or stands after rain. We disagree—and so does the Supreme Court.	The law does already apply -- though there is significant uncertainty about its application to any given location because of policies adopted under the prior administration -- at least to those waters that, in the aggregate, significantly affect downstream waters' physical, chemical, or biological integrity. The proposal would provide far more clarity about where those conditions are satisfied.
• The Clean Water Act and its regulations have multiple exclusions and exemptions from jurisdiction and permit requirements. The rule does not change or limit any of them.	Congress wrote many exemptions to prevent federal permit requirements for farming. But Congress used language that assumed farming happens on land, not in "waters of the U.S." By defining land to be "waters of the U.S.," the rule would result in federal permit requirements for countless farming activities.	Congress plainly knew that agricultural pollution would be discharged into covered waters due to activity on land, and that's why it sought to exclude some activities from permitting. (It should be noted that this choice was not without consequences -- many water bodies are unable to meet state-established standards for water quality because of agricultural pollution.) The final sentence of the Farm Bureau's statement here is just a repetition of its fallacious and doctrinaire suggestion that wetlands and certain kinds of streams are "land."
The proposed rule will NOT bring all ditches on farms under federal jurisdiction. • Some ditches have been regulated under the Clean Water Act since the 1970s.	Oh, really? Point to a ditch that was regulated as a water of the U.S. in the 1970s. **The CWA DOES NOT regulate ditches as waters of the United States**. The Corps informally (not in regulation) said that *some ditches could be regulated as waters under the 404 program on a case-by-case basis*. **The rule goes much further by broadly defining almost all ditches as waters of the U.S. under all CWA programs**. Technically, even mowing the grass in a ditch would require a federal permit under the rule.	Can do. Here are three: • Arlington Canal, "an earthen irrigation ditch which flows roughly parallel to the Gila River" [U.S. EPA, Office of General Counsel, *In re Buckeye, Ariz.*, 1977 WL 28254 (Nov. 11, 1977)] • Non-navigable, artificial mosquito canals connected to Papy's Bayou in Florida [*U.S. v. Holland*, 373 F. Supp. 665 (D. Fla. 1974)] • A Louisiana canal adjacent to (and from which water was periodically pumped into) protected wetlands [*U.S. v. St. Bernard Parish*, 589 F. Supp. 617 (E.D. La. 1984) (Note: case involved discharges during 1970s and 1980s)] The longstanding regulations also clearly encompass these features, since they include "tributaries" as well as "[a]ll other waters … the use, degradation or destruction of which could affect interstate or foreign commerce…." [Existing regulations at 40 C.F.R. §§230.3(s)(3) & (5)] No, mowing a ditch wouldn't require a permit; maintenance of drainage and

		irrigation ditches are covered by an exemption in the Act. [Clean Water Act §404(f)(1)(C)]
• The proposed rule does not expand jurisdiction.	This is false. Non-navigable features that do not contain water most of the time are <u>not</u> currently regulated without a case-by-case finding that the particular feature has a significant effect on navigable waters—taking into account the volume, frequency and duration of flow and proximity to navigable waters. The proposed rule will <u>categorically</u> regulate as "tributaries" all non-navigable "ephemerals" that <u>ever</u> carry <u>any</u> amount of water that finds its way to a navigable water—regardless of the volume, frequency and duration of flow and regardless of the distance to actual navigable waters. This alone is a huge expansion. (But there are other examples, too.) Here is just one example of how broad the definition of a "tributary" will be: "These effects occur even when the tributaries flow infrequently (such as ephemeral tributaries) and even when the tributaries are large distances from the (a)(1) through (a)(3) water (such as some headwater tributaries). When all the tributaries in a watershed are considered together, these effects are significant." "Tributaries that are small, flow infrequently, or are a substantial distance from the nearest (a)(1) through (a)(3) water (*e.g.*, headwater perennial, intermittent, and ephemeral tributaries) are essential components of the tributary network and have important effects on the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters, contributing many of the same functions downstream as larger streams." (79 Fed. Reg. 22205-6)	As indicated above, this "expansion" question comes down to where you begin your analysis. It is not an expansion over traditional coverage, which the Farm Bureau acknowledges protected virtually all surface waters. It will protect slightly more than is being protected today, though it is hardly true that it is a "huge expansion." The agencies estimate about 3% additional water bodies will be covered as a consequence of the rule. With respect to tributary streams, that'll increase coverage by about 2%, and nearby wetlands by about 1.5%. [Economic Analysis, p. 11] It is not true that every feature that carries any amount of water that ever gets to a navigable water is covered. The proposed rule would expressly exempt non-wetland swales, gullies, and rills. [Proposed 40 C.F.R. §230.3(t)(5)(vii)] and would also require a feature that contributes flow downstream to have a bed and bank and an ordinary high water mark to be considered a tributary. [Proposed 40 C.F.R. §230.3(u)(5)] The passages the Farm Bureau quotes are indisputable. The reason tributary streams would be covered is precisely because they have these important impacts. And this isn't a novel revelation; federal law has regulated discharges of refuse matter into navigable waters "or into *any tributary* of any navigable water from which the same shall float or be washed into such navigable water" *since 1899*! [33 U.S.C. §407 (emphasis added)]
• For the first time, the agencies are clarifying that all ditches that are constructed in dry lands and drain only dry lands are not "waters of the U.S." This includes roadside ditches and ditches collecting runoff or drainage from crop fields.	If water ever flows to a ditch from any "wetland" area (often just a small low spot), or from any "ephemeral" drain, or from any overflow of a pond during very heavy rains, the ditch will not qualify for this exclusion (because it does not drain only "uplands"). Also, if the ditch itself has "wetland" characteristics—which tends to happen because ditches do, after all, carry water when it rains—the ditch	Does the Farm Bureau have any data to back this up? Any quantification of the number of ditches that replace or drain water bodies such as wetlands? And, with such a quantification, does the Farm Bureau have any assessment of the water quality impact of allowing their destruction or pollution? If so, it has the perfect opportunity – the currently-open comment period – to identify concerns it

	will not qualify and will be regulated. Very few ditches will qualify for this exclusion—most ditches will be jurisdictional. (79 Fed. Reg. 22203-4) Here is just one part of EPA's justification for defining "tributary" to include "ditches" and "canals:" "Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies' position that ditches that meet the definition of tributary (which does not include ditches excluded under paragraphs (b)(3) and (b)(4)) provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule." (79 Fed. Reg. 22206)	might have and show that cutting certain features out of the Clean Water Act will be harmless.
• Ditches that are IN are generally those that are essentially human altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.	False. Ditches that are IN are all ditches that flow to any stream or river (through any number of other ditches), except those that contain no "wetland" areas along their entire length, and that drain only "upland" (no stormwater from wetlands or ponds or other waters ever flows to the ditch). The vast majority of ditches are IN. (79 Fed. Reg. 22203-4) The ditches that are "in" are far more than "human altered streams." A ditch that happens to sometimes receive rainwater overflows from nearby wetlands is not a human altered stream. A ditch that displays wetland characteristics due to the presence of water is not a human altered stream. A ditch excavated in a low area that naturally channels rainwater is also not a human altered stream. "Ditches may have been created for a number of purposes, such as irrigation, water management or treatment, and roadside drains. In order to be excluded, however, the ditch must be excavated wholly in uplands, drain only uplands, and have less than perennial flow." (79 Fed. Reg. 22203-4)	Not "all ditches" that meet the Farm Bureau's description will be covered. Rather, the rules use scientific indicia of flow or permanence to potentially include waterways in the law's coverage. To be a tributary, a flowing waterway needs to have an ordinary high water mark and a bed and bank. [Proposed 40 C.F.R. §230.3(u)(5)] Likewise, a ditch that has water from time to time is not going to magically turn into a wetland; to be a wetland, the rule would define "wetlands" to mean "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." [Proposed 40 C.F.R. §230.3(u)(6)]
• Ditches that are OUT are those that are dug in dry lands and don't flow all the time, or don't flow into a jurisdictional water.	Again, false. Ditches that are OUT are those that are "upland" (not wetland or water) along their entire length, and that drain only "upland" (no water ever flows to the ditch from wetlands or ponds or other waters). These are mythical	They're not "mythical," at least according to the Farm Bureau's anti-clean water coalition partner, the National Association of Home Builders. In litigation challenging an Army Corps general permit authorizing discharges into

	ditches. People don't dig ditches along ridges. Any other ditch that ever carries rainwater that ever makes its way (through any number of other ditches) to navigable waters is IN. (79 Fed. Reg. 22203-4)	certain "upland ditches," NAHB said that "NAHB"s members often construct 'upland ditches' to control stormwater runoff from construction sites or to drain roads" and alleged that there are "millions of miles of non-tidal upland ditches found throughout the nation…." [Appellants' Opening Brief, *National Association of Home Builders v. U.S. Army Corps of Eng'rs*, No. 10-5169, at 8 & 35 (D.C. Cir. Mar. 25, 2011)]
• Farmers, ranchers and foresters are exempt from Clean Water Act Section 404 permitting requirements when they construct and maintain those ditches, even if ditches are jurisdictional.	This is contradicted by Corps' interpretation and enforcement under Section 404. If the "flow" of jurisdictional features is altered, the Corps views the activity as regulated (i.e., permit required). 33 CFR Section 323.4	The Act generally exempts discharges of dredged or fill material from the permit obligation when they are associated with "construction or maintenance of farm … irrigation ditches, or the maintenance of drainage ditches." [Clean Water Act §404(f)(1)(C)] However, Congress – not the Corps – specified that discharges with more serious impacts "shall be required to have a permit" even if they are otherwise exempt. It is perfectly appropriate to ensure that such activities are closely reviewed, and EPA and the Corps couldn't change this legal requirement even if they wanted to.
The proposed rule does NOT mean permits are needed for walking cows across a wet field or stream.	Technically, EPA could absolutely require a permit for this. Manure is a Clean Water Act "pollutant." If a low spot on a pasture is a jurisdictional "wetland" or "ephemeral stream" under the new rule, EPA or a citizens group could sue the owner of cows that "discharge" manure into those jurisdictional waters without a Section 402 permit. Seriously.	This is not serious. A cow is not a "point source" under the law. [*Oregon Natural Desert Assn. v. Dombeck*, 172 F.3d 1092, 1099 (9th Cir. 1998) ("It would be strange indeed to classify as a point source something as inherently mobile as a cow.")] The Farm Bureau's fight to hold on to even its most absurd and false allegations about this rule should make anyone pause before trusting anything the Farm Bureau claims the proposal does.
• Normal farming and ranching activities are not regulated under section 404 of the Clean Water Act.	Only partially true. The "normal" farming exemption only applies to discharges of "dredged or fill material" under Section 404. It does not apply to discharges of other "pollutants" (e.g., dust, manure, fertilizer, herbicide) regulated under Section 402. Also, EPA and the Corps have interpreted the normal farming exemption to only apply where farming has been ongoing at the same location since 1977. *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).	It is true that not all agricultural discharges are exempt from the law; that is how Congress wrote it. However, the Farm Bureau doesn't mention here that discharges of things like fertilizer and pesticides are routinely excluded under separate exemptions in the law for "agricultural stormwater discharges and return flows from irrigated agriculture." [Clean Water Act §502(14)] As noted above, the claim that the agencies require farming to occur on an ongoing basis since 1977 to trigger the "normal farming" exemption is false.
The proposed rule will NOT apply to wet areas on fields or erosional features on fields.	So you say now. How will enforcement inspectors later know the difference between a "water-filled area on a crop	Again, ephemeral streams and wetlands have defined meanings – distinct from simple wet areas -- based on scientific

• Water-filled areas on crop fields are not jurisdictional.	field" and a "seasonal pond" or "wetland" or "ephemeral stream"—any of which can be regulated? The rule says that even small and temporary waters can be regulated. Isolated waters are categorically regulated if they are in floodplains or nearby ditches. (79 Fed. Reg. 22209)	indications of flow and permanence. With respect to ponds, it is reasonable to expect that the agencies will similarly require some indication that the water body is a defined feature on the landscape; for instance, the Corps' regulations already specify that the limits of jurisdiction of all non-tidal waters is the ordinary high water mark (or the extent of any adjacent wetland). [Existing 33 C.F.R. § 328.4(c)] But, if the Farm Bureau believes that this approach is not right for some reason or another, it should by all means make its views known during the currently-open comment period.
• The proposal specifically excludes erosional features from being "waters of the U.S."	The proposal also says it can be hard to tell the difference between an erosional feature and an "ephemeral stream," which is regulated. (79 Fed. Reg. 22219) That leaves it for enforcement inspectors and lawyers to decide later!	Or, the final rule could – with the Farm Bureau's and others' constructive input – define these terms further. Indeed, the agencies specifically asked for public comment on this very subject: "The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional." [79 Fed. Reg. at 22,219]
EPA is <u>NOT taking control of ponds in the middle of the farm</u>. • The proposed rule <u>does not change jurisdiction over farm ponds.</u> • The rule <u>does not affect the existing exemption Congress created for construction and maintenance of farm or stock ponds</u>. • The proposed rule would for the first time <u>specifically exclude stock watering ponds</u> from jurisdiction.	We've <u>already</u> seen EPA enforcement claiming farm ponds were built illegally because they were built in low spots where water naturally channeled. (EPA couldn't wait until the proposed rule becomes final to go ahead with these enforcement actions.) • Maybe that's because EPA has already started illegally enforcing jurisdiction over farm ponds built in low spots. • False. The rule makes the farm pond exemption meaningless, because the exemption does not apply to impoundments of "navigable waters." By regulating low spots as "navigable waters," the rule would prevent building a farm pond on a low spot without a Section 404 permit. 33 CFR Section 323.4(a)(3) • Like the farm pond exemption, this exclusion would only apply if the watering pond is built "by diking dry land." It also has to be used "exclusively for" stock watering. What if it is also used for other purposes? Can a row crop farmer	Where? It is hard to address claims about which the Farm Bureau won't provide any specifics. However, the conservative media and certain members of Congress have claimed that an EPA enforcement action with respect to a Wyoming landowner that dammed a perennial stream to create a stock pond is an example of agency overreach. If that is the case that the Farm Bureau refuses to identify, then it is not at all about discharges into the pond, but rather the filling 40 feet of a stream called Six Mile Creek with "sand, gravel, clay, and concrete blocks" to create a dam, and doing so without getting any kind of Clean Water Act permit for the discharge. Note again here the Farm Bureau's rhetorical trick of referring to wetlands as "low spots," rather than long-understood hydrological features. The Farm Bureau leaves out key pieces of the proposal in its last objection – the pond need not only be for stock watering but "exclusively for such purposes as stock watering, irrigation, settling basins,

	have one of these ponds?	or rice growing." So, yes, a row crop farmer can construct an irrigation pond in dry land and, because it would not be a protected water body, he or she can discharge pollutants into it without a permit. Actually, even if an irrigation pond was a protected water body, a farmer could discharge into it with the proper authorization from the appropriate state or federal pollution control officials.
The interpretive rule does NOT redefine normal farming as only those 56 conservation practices.	By suggesting that "clarification" was needed to exempt these 56 practices because they are not listed in the Clean Water Act, the interpretive rules casts doubt over the exempt status of all other farming practices that are not listed in the statute. The statute lists only "plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices." Normal farming, ranching and forestry practices that are regularly implemented on the farm are classified as conservation practices by the IR. For example, building a terrace or a fence, planting cover crops and prescribed cattle grazing are all normal farming activities that have not been subject to permits or NRCS standards until now. The IR does not distinguish between these normal farming activities and the same activities conducted solely for conservation purposes – making them subject to compliance with NRCS standards.	Although NRDC has concerns of its own that the interpretive rule goes too far in exempting practices from Clean Water Act permitting that do not appear to be "normal farming," the Farm Bureau's claim here protests too much. The interpretive rule says on its face that it "identifies additional activities considered exempt from permitting," and does not say anything about any other activities.
• If a permit was not needed for a particular practice before, a permit won't be needed now.	False. The 56 listed conservation practices will now only be exempt from permit requirements if they comply with NRCS standards. For other farming practices, most will require either a Section 402 or 404 permit under the proposed rule if they occur in or near a newly regulated "ephemeral" or ditch or low spot ("wetland"). (If Ms. Stoner truly believes this statement, it may be because she already thinks most farming in or near any ditch or ephemeral or small isolated wetland already requires a Clean Water Act permit. We disagree.)	For starters, ephemeral streams and wetlands will not be "newly regulated" by this rule. These features have been protected under the law consistently; the only question is whether they are categorically protected or whether they are almost always protected, but subject to a time-consuming and resource-intensive process to make that determination. With respect to the role of the NRCS standards, we understand EPA and the Corps intend that, to qualify for the exemption the agencies are seeking to create for projects that benefit water quality, the NRCS standards need to be followed, but that does not mean that the same activities (fence-building, e.g.) will

		require permits if not undertaken in compliance with the NRCS standards – they might still be considered "normal farming." Nevertheless, if the interpretive rule stays in effect, we agree with the Farm Bureau that this particular point could be clarified.
• These 56 practices clarify and add to all of the practices that are being implemented in the field today and currently considered normal farming and exempt from permitting. The interpretive rule adds to what is exempt.	That is not clear from the interpretive rule.	As noted above, it's not only clear, it stresses this point specifically.
• The "normal farming" exemption is broader than these 56 practices. So if farmers implement other practices, or don't use NRCS funds, they would continue to be exempt in the same way they are now.	The "normal" farming exemption does include more than these 56 practices, but according to longstanding Corps and EPA interpretations, it only exempts farming that has been ongoing at the same site since 1977. That's true for these 56 practices and other practices. That is why regulating land as if it were "waters" under the proposed rule will result in federal permit requirements for many commonplace and essential farming practices. Nothing in the interpretive rule says that the requirement to meet NRCS standards is limited to farmers using NRCS funds.	Again, there is no basis for the claim that the "normal farming" exemption extends only to those operations where farming has been ongoing since 1977.
• This rule is self-implementing, which means that a farmer is not required to seek approval from or consult with any agency (including USDA, EPA, and the Corps) to implement a conservation practice and be exempt from permitting.	Farmers have never had to seek pre-approval from any federal agencies to conduct exempt farming practices. The difference is that now farmers are more likely to be sued by the government or citizens groups claiming they did not fully comply with NRCS standards or that their practices are not all listed in the statute and in the interpretive rule.	As indicated earlier, NRDC understands the agencies' intent in issuing the interpretive rule to provide clarity that these activities undertaken in accordance with NRCS standards are exempt (unless they have impacts such that they are required to be permitted under the Act), nothing more, nothing less. However, the suite of practices the agencies exempted is so broad and in many cases seems far removed from "normal farming," and it was done without taking public comment, unlike the separate clean water rule. Consequently, NRDC actually agrees with the Farm Bureau – albeit for entirely different reasons – that the interpretive rule should be withdrawn.
NPDES permits will NOT be required for the application of fertilizer to fields or surrounding ditches or seasonal streams.	False. If there are jurisdictional "wetlands" (low spots) or ephemerals (drainage areas) within farm fields or ditches beside or within farm fields, and if even miniscule amounts of pesticide or fertilizer fall into those features (intentionally or not), this would be an	The Farm Bureau is exaggerating again. For one, runoff from treated fields due to rainfall or irrigation return flow is not required to be permitted. [Clean Water Act §502(14)] In addition, wetlands in farm fields, if they qualify as "prior converted cropland," are not covered

	unlawful "discharge" of "pollutant" that would trigger liability of up to $37,500 per discharge per day without an NPDES permit.	waters, nor are various ditches dug in dry land or ponds used for specified agricultural purposes.
• All ditches constructed in dry land and that drain only dry land, and flow only part of the year, are not jurisdictional and thus would not need a permit for any action.	See above—the vast majority of ditches will NOT qualify for this exclusion. Most ditches will be deemed "tributaries" and therefore "waters of the U.S.," even at times when they are completely dry.	Again, the Farm Bureau provides no support for its allegations here, and it it important to remember that a "ditch" will only qualify as a tributary if it has indicia of sufficient flow (ordinary high water mark and bed and bank) *and* if it is not otherwise exempt. And, of course, not all discharges into even those man-made features that qualify as tributaries need permits; many activities are exempt. Where permits are required, general permits are available for the most common kinds of agricultural discharges. And it bears noting that a discharge into a tributary that happens to be dry at the time of the discharge doesn't render it harmless; pollutants will be carried downstream when rain falls.
• The pesticide general permit only requires an NPDES permit where pesticides are applied directly to a water of the U.S.	A pesticide general permit does not "require" NPDES permits at all—it is just the most readily available permit for many pesticide dischargers. If the pesticide general permit for your state applies only to "direct" application of pesticide into waters, then farmers would need to go through the very costly and time-consuming process of obtaining individual permit coverage for any pesticide that might fall incidentally or be blown by wind into the "ephemerals" and ditches within and around farm fields.	The discharge of pesticides to waters protected by the law needs to be permitted when a pesticide is applied directly to waters or when "application is made such that a portion of the pesticide will be unavoidably deposited to waters of the United States and result in a discharge (for example, an application is made on a creek bank)…." This is perfectly appropriate, given how harmful pesticides can be to aquatic life, among other things, and it is clearly required by the Clean Water Act. [*National Cotton Council of America v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009)]
• Pesticide applicators can avoid direct contact with jurisdictional waters when spraying crop fields.	Sounds like EPA doesn't have much experience with farming! In much of our most productive farmlands (areas with plenty of rain), it would be extremely difficult to entirely avoid the small wetlands, ephemerals and ditches in and around farm fields. Any accidental spray—of any amount—into these features (even at times when the features are completely dry) would be an unlawful discharge (with penalties of up to $37,500).	There are clearly protected features on farm land today – things like perennial streams and nearby wetlands – and the requirement to obtain permits for discharges of pesticides to them exists today. Agricultural producers and pesticide applicators are working with this requirement already. If this proposal is finalized, and the coverage of the law increases over today's level by 3% (though, as noted above, this would still be less than the coverage during the Reagan administration), these applicators will likely need to get permits for pesticide use near 3% more waters – hardly a mammoth upheaval. That's especially true given the wide availability of general permits for pesticide

		application.
Federal agencies are NOT asserting regulatory authority over land use.	False. When federal agencies have the power to grant, deny or VETO a federally enforceable permit to plow, plant, build a fence, apply fertilizer or spray pesticide or disease control products on crops, that IS regulatory authority over land use. If a landowner cannot build a house on, build a fence over or plow through a jurisdictional wetland or ephemeral drain that runs across his or her land, then that is regulating land use. If a farmer cannot redirect a ditch to improve drainage on his soybean farm, then that is regulating land use. In addition, note the following quote from Secretary Darcy during a hearing on June 11 before the House Transportation & Infrastructure Water Resources and Environment Subcommittee – "*Once implemented, this rule will enable the Army Corps of Engineers to more effectively and efficiently protect our nation's aquatic resources while enabling appropriate development proposals to move forward.*" Congress did not give either EPA or the Army Corps the authority to determine "appropriate" land uses.	There are too many unfounded claims in this statement to rebut them all. Suffice it to say that the Farm Bureau ignores the numerous statutory exemptions available to agricultural dischargers, to say nothing of the exemptions that EPA and the Corps have created for water bodies on agricultural land. Also, the implication that permits might be denied or vetoed as a regular matter is simply belied by the facts. The Corps, for instance, denies fewer than 3% of requests for permits across the country. Finally, the point EPA is making and that the Farm Bureau would apparently rather ignore is that the Clean Water Act's permit programs apply when there is a discharge of pollutants into protected waters. Of course the law allows for the regulation of activities on land that pollute water; a sewage treatment plant must have a permit under the law that requires it to meet certain standards.
• The CWA only regulates the pollution and destruction of waters.	Actually, it is "navigable waters" or waters so closely connected to navigable waters that they have a significant effect on those navigable waters. Whether you like it or not, the Supreme Court has said this does not mean all waters (even "waters" that are usually dry).	The Farm Bureau can't seem to keep its story straight about what the law protects. In 2005, it said the Act only includes "waters that are 'navigable'—that 'were or had been navigable in fact or which could reasonably be so made.'" [Brief for American Farm Bureau Fed., *Rapanos v. U.S.*, No. 04-1034 (U.S., Dec. 2005)] In 2009, it joined a letter that was broader and said: "The undersigned organizations fully support the protection of navigable waters of the United States. We also fully understand that, to achieve that goal, we need to protect rivers and streams that flow to navigable waters." [Letter from Waters Advocacy Coalition to Senators Boxer & Inhofe (June 12, 2009)] The statement to the left appears to go further still, acknowledging that the law can protect those waters that significantly affect downstream waters. In light of this concession, the Farm Bureau should be embracing, not attacking, the proposed rule, which is based on a peer-reviewed scientific assessment of more than 1,000

		pieces of peer-reviewed literature looking at the effects of various waters on downstream ones.
• The Clean Water Act protects waters, the life blood of communities, businesses, agriculture, energy development, and hunting and fishing across the nation.	Yes—and the Clean Water Act created non-regulatory programs to address water quality impacts of land uses like farming. Those programs have been and can continue to be very effective. We don't need to require a federal permit for everything in order to protect waters.	The Gulf of Mexico "dead zone," which is fueled in significant part by agricultural pollution, is an example of how a hands-off approach to such pollution can have major adverse consequences. At a bare minimum, as Justice Kennedy pointed out in the most recent Supreme Court case, it is a case study in how "[i]mportant public interests are served by the Clean Water Act in general and by the protection of wetlands in particular," given that "[s]cientific evidence indicates that wetlands play a critical role in controlling and filtering runoff." [*Rapanos v. U.S.*, 547 U.S. at 777] Thus, protecting those waters that have important effects on downstream water quality is essential to ensuring that clean water is achieved, despite discharges from less-regulated sectors like agriculture.
• The agencies expect that a very small number of additional waters—3.2 percent—will be found jurisdictional compared to current practice because of greater clarity regarding whether waters are protected or not.	Actually, EPA's poorly done economic analysis concludes that the new rule will result in regulation over an additional 2.7 percent of waters; the 3.2 percent figure Stoner cited wasn't used in the final calculations. Either way, the figure is absurdly low and according to EPA will only lead to an additional 1,332 acres under EPA's control. EPA arrived at this figure by analyzing permit information for the Section 404 (dredge and fill) program exclusively and by focusing on FY09/10, a period of significant economic contraction. EPA looked at the number of acres evaluated by the Corps that year that were determined *not* jurisdictional, and then estimated how many of those acres *would become* jurisdictional under the proposed rule. EPA did not even attempt to determine the number of acres of ephemeral drains, ditches and isolated wetlands nationwide that will be newly regulated under the rule. If it had done so, the agency's numbers would have been much larger. After all, more than 106 million acres of wetlands are currently being used for agricultural purposes. Even if only 2.7 percent of those acres become newly regulated under this rule, that would be more than 2.8 million additional regulated farm acres.	This analysis was developed by experts in the field and reviewed by staff of the Office of Management & Budget. But, anyone, including the Farm Bureau, who has remaining criticisms has an opportunity to put them forward as part of comments on the proposal. With respect to the wild estimate of 2.8 *additional* million acres of wetlands covered by the law, the Farm Bureau again misleads people. Its calculations imply that none of the wetlands being used for agricultural purposes today are covered by the law. In fact, many wetlands are actually protected by the law today, but it takes a significant amount of time and resources to establish those protections. Moreover, to the extent that any of these wetlands are "prior converted cropland," they are exempt from being considered covered waters, and that exemption would continue under the proposal. And, finally, the Farm Bureau's estimate of 106 million acres of wetlands in agriculture today appears to be unreliable; the most recent U.S. Fish & Wildlife Service report on wetlands trends found that there are only about 110 million wetland acres *total* in the continental U.S.